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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 1189

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD., and DIAMOND TRADING COMPANY, LTD.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PETITIONERS

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May 1, 1945.

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ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 168) has been reported only in the C. C. H. Federal Trade Regulation Service, April 19, 1945, par. 57,354.

JURISDICTION

Jurisdiction of this Court rests upon the provisions of § 262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. § 377).

The learned District Judge, in an equity proceeding under the Sherman Anti-trust and Wilson Tariff Acts, has

entered an order entitled "Preliminary Injunction" (R. 171), which however is in substance solely a *sequestration* of the bank account of petitioner De Beers in a New York bank, amounting to $59,320. The order enjoins both De Beers and the bank from making any transfer or other disposition of the sequestered account, by express avowal for the purpose of ensuring the presence here of the sequestered account as security for the performance by De Beers of any decree which may ultimately be entered against it in the proceeding.

Summarized, the petitioners' view is that grant of the common law[1] writ of certiorari is appropriate in the present case because it is (a) one of public importance in a field in which (b) appellate jurisdiction lies exclusively in this Court and not in the Circuit Court of Appeals, and (c) the decision below itself rested in part upon the same § 262 of the Judicial Code, and (d) caused immediate and tangible injury to petitioners by sequestering their funds (e) without any support in law.

This Court has exclusive appellate jurisdiction in equity suits by the Attorney General under the Sherman anti-trust law.[1] Judicial Code § 238 (28 U. S. C. § 345). Expediting Act of Feb. 11, 1903, c. 544, 32 Stat. 823, as amended by Act of June 25, 1910, c. 428, 36 Stat. 854 (15 U. S. C. § 29). This Court has said that under these statutes no appeal from an interlocutory order lies to the Circuit Court of Appeals. *United States* v. *California Co-Operative Canneries*, 279 U. S. 553, 558-9. The question as to the

[1] Petitioners have, however, *ex majore cautela*, filed a notice of appeal in the 2nd Circuit Court of Appeals, under § 129 of the Judicial Code, Act of March 3, 1891, c. 517, 26 Stat. 828, 28 U. S. C. § 227.

exercise of a discretionary power to entertain the petition without prior hearing in a Circuit Court of Appeals, which divided this Court in *Ex Parte Peru*, 318 U. S. 578, is absent here.

This Court granted on March 5, 1945, petitions in Nos. 1016 and 1017, *United States Alkali Export Association, Inc.* v. *United States, and California Alkali Export Association* v. *United States*, requesting however that counsel "discuss in their briefs and upon oral argument the question whether the order of the District Court may appropriately be reviewed at the present stage of the proceedings by writ of certiorari under § 262 of the Judicial Code." There are present in this case features which were absent in Nos. 1016 and 1017, as follows:

(1) Actual sequestration of property of the petitioner De Beers, for which a petition under § 262 is the only available form of appellate relief.

(2) An order entered below under purported authority of § 262 itself, and therefore falling within the class of orders which the Solicitor General conceded (in his brief in opposition to grant of the writ in Nos. 1016 and 1017) to provide a characteristic occasion on which this Court had granted the writ. His brief read at p. 6:

> "* * * we summarize immediately below the circumstances under which this Court has issued certiorari under that Section [262]. Certiorari has thus issued * * * (4) to review the action of circuit courts of appeals with respect to the issuance of writs under Section 262 itself;" citing *Whitney* v. *Dick*, 202 U. S. 132, and *McClellan* v. *Carland*, 217 U. S. 268.

STATUTES

AS TO THE WRIT

Judicial Code

Act of March 3, 1911, c. 231, 36 Stat. 1087, 61st Cong., 3rd Sess. (S. 7031, Public 475), as amended.

§ 262 (28 U. S. C. § 377) Power to issue writs. The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

* * * * *

Sec. 24. (28 U. S. C. § 41) The district courts shall have original jurisdiction as follows: * * *

Twenty-Third. Of all suits and proceedings arising under any law to protect trade and commerce against restraints and monopolies.

* * * * *

Sec. 238. (28 U. S. C. § 345) A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

(1) Section 2 of the Act of February 11, 1903, to expedite the hearing and determination of certain suits brought by the United States under the antitrust or interstate commerce laws, and so forth.

Expediting Act

Act of Feb. 11, 1903, c. 544, 32 Stat. 823, 57th Cong., 2d Sess. (S. 6773, Public 82), as amended by Act of June 25, 1910, c. 428, 61st Cong., 2d Sess., 36 Stat. 854 (H. R. 26233, Public 310).

Sec. 1. (15 U. S. C. §28) In any suit in equity pending or hereafter brought in any district court of the United States under the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, * * *.

Sec. 2. (15 U. S. C. § 29) In every suit in equity pending or hereafter brought in any district court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: * * *.

AS TO THE MERITS

Sherman Anti-Trust Act

Act of July 2, 1890, c. 647, 26 Stat. 209, 51st Cong., 1st Sess. (S. 2, Public 190), as amended.

Sec. 1. (15 U. S. C. § 1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the

several States, or with foreign nations, is hereby declared to be illegal:

* * * * *

Sec. 2. (15 U. S. C. § 2). Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty * * *

* * * * *

Sec. 4. (15 U. S. C. § 4) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *

Wilson Tariff Act

Act of Aug. 27, 1894, c. 349, 28 Stat. 509, 53d Cong., 2d Sess., (H. R. 4864, Public 227), as amended by Act of Feb. 12, 1913, c. 40, 37 Stat. 667, 62d Cong., 3d Sess. (H. R. 25002, Public 370).

Sec. 73. Every combination, conspiracy, trust agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or com-

merce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

Clayton Act

Act of Oct. 15, 1914, c. 323, 38 Stat. 736, 63d Cong., 2d Sess. (H. R. 15657, Public 212), as amended.

SEC. 12. (15 U. S. C. § 22) *District in which to sue corporation.*—Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

RULES OF CIVIL PROCEDURE

(28 U. S. C. following § 723c).

RULE 4. PROCESS. * * * Service shall be made as follows: * * *

(3) Upon a domestic or foreign corporation * * * by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process * * *.

RULE 64. SEIZURE OF PERSON OR PROPERTY. At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

RULE 65. INJUNCTIONS. * * *

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only

upon the parties to the action, their officers, agents, servants, employees, and attorneys; and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

STATEMENT

(A) The underlying facts.

The complaint was filed on January 29, 1945, against the petitioners (all South African corporations) and six other foreign corporations and seven individuals. None of the individuals has any connection with the petitioners.[2]

The action has to do with the diamond industry in Africa and in England, the basic facts being:

(1) The first two petitioners (De Beers and Diamond Corporation) are engaged in the Union of South Africa respectively in mining and in purchasing from other miners rough gem and industrial (i. e. raw uncut) diamonds, and are required to sell their diamonds exclusively through a pool established under statute of the Union of South Africa[3] (R. 3, 86, 113).

(2) The petitioner Diamond Trading Company, Ltd., also a South African company, is engaged in selling raw-uncut diamonds in London (R. 18, 86, 114).

---

[2] One Parkinson is alleged to be an officer of De Beers (R. 6). He ceased to be such in January 1944 (R. 120), and in any event Parkinson has not been served. The other individual defendants are alleged to have some connection with various corporate defendants other than the three petitioners herein.

[3] In the blue-covered Supplement to this Brief we set out the South African statute (The Diamond Control Act of 1925) as Appendix A.

(3) The other corporate defendants either are, or own stock in, diamond mining companies operating in Africa, the products of which companies are also sold in their raw uncut form in South Africa and London by the petitioner Diamond Trading Company, Ltd. (R. 4-5, 15).

(4) None of such corporations conducts a regular business of exporting into the United States or selling within the United States. Purchasers desiring to have stones cut and polished for the American market and to sell in America purchase the raw uncut diamonds from the petitioner Diamond Trading Company, Ltd. in London (R. 35).

(5) The trade alleged to be restrained is the import and sale (by others than the defendants) of diamonds in the United States (R. 9).

(6) The only actual sales made by any of the petitioners in the United States were these:

(i) De Beers made a single sale in 1940—of the jewels exhibited by it at the New York World's Fair (R. 128).

(ii) Diamond Corporation made a single sale in 1941—to, and at the request of, the Procurement Division of the United States Treasury Department (R. 128).

(iii) Diamond Trading Company has made no sale in the United States, but has made three sales in London to, and at the request of, United States Government Agencies (to the Treasury Department in 1941, to Metals Reserve Company in 1942 and

to United States Commercial Company, a subsidiary of Reconstruction Finance Corporation, in 1944 (R. 129).

These last four sales were all in connection with the war effort, as was the deposit of a stock pile of diamonds made in Canada pursuant to treaty between the governments of the United States, Canada, and of the United Kingdom (R. 137).

(B) The order appealed from.

The government frankly sought the order here at issue as a sequestration ("because sequestration of said property is the only means of enforcing this Court's orders or decree against said foreign corporate defendants" R. 29).

The order does not purport to enjoin the petitioners from any restraint of trade or other action cognizable under the Sherman or Wilson Acts. It is, therefore, not ancillary to the end-relief of an injunction sought by the complaint under those Acts. Nor is a forfeiture sought by the complaint under § 6 of the Sherman Act or § 76 of the Wilson Act.

The District Court's opinion and conclusions of law purport to find power to grant the order under § 4 of the Sherman Act *and* under the same section of the Judicial Code upon which the petition for writ of certiorari was based,—§ 262, 28 U. S. C. § 377. The District Court opinion states (R. 168):

> "* * * that if the injunction does not issue, the assets of the corporate defendants will in all probability be withdrawn from this country. In that event, if the government should succeed in establish-

ing its cause, there would be no way to enforce the decree of the court."

The order was entered upon the complaint and affidavits.

The affidavits upon which the government's motion rested were verified exclusively by one of the government's attorneys. They were devoid of any documentary support, by exhibit or otherwise. No one in the industry supported the application nor was it supported even by any affidavit from any other government official.

The petitioners provided in opposition ten affidavits verified by residents of the United States, all familiar with various phases of the practical industry or with the banking transactions which were the objective of the government's motion for sequestration (R. 85 *et seq.*).

Before the defendants filed any affidavits, however, a temporary restraining order had been granted *ex parte* to the government on January 29, 1945, and had been forthwith served upon a number of banks. Admittedly too sweeping in its terms, it was modified in successive restraining orders issued at ten day intervals and in the eventual order for preliminary injunction (sequestration) (R. 41-52, 62-65, 79-84).

The affidavits for the petitioners served a three-fold purpose:

(1) To prove that there was no jurisdiction in the Southern District of New York or anywhere in the United States over the persons of the petitioners.

(2) To show that allegations of the complaint, possibly material, were erroneous in fact, and

(3). To show that there was no ground upon which to support the preliminary injunction, assuming that as a matter of law the District Court had power to grant an injunction (a sequestration) of the character granted.

In effect, the position taken by the petitioners before the District Court was that (1) the injunction must be denied because the action was unfounded both (a) because the Court lacked jurisdiction over the persons of the defendants-petitioners and (b) because the complaint, perhaps on its face and in any event when read together with the defendants' affidavits, exhibited a case of too dubious a character to support any preliminary injunction, and (2) that the preliminary injunction in itself exceeded the Court's power, as it was not an injunction of the nature provided for under the anti-trust laws.

We must assume upon this petition that the agreements in the Union of South Africa and in the United Kingdom are such as would, if they were made and existed in the United States, be violative of the Sherman Act. It is precisely because the parties to those agreements have been diligent to see to it that they are not present within the United States and that they do not do business here that the government has sought a sequestration of their property here, upon the ground that otherwise the Court will have no means of enforcing their obedience to any decree, for otherwise they will have no motive to accept extra-territoriality for United States law. This is recognized in the opinion of the District Court where, in the paragraphs next after the one already quoted, it says (R. 169):

"The resulting damage to the government, if I were to deny this motion, is incomparably greater than any damage to the corporate defendants if I were to grant the motion.

"Equity will take necessary steps to protect its jurisdiction where, as here, there is a great probability that the enforcement of its decrees will otherwise be frustrated."

SUMMARY OF ARGUMENT

I

FOREWORD AS TO THE CASE GENERALLY AND THE ISSUES OF PUBLIC POLICY NECESSARILY PRESENTED.

We respectfully submit that this is an unusual case in which the entire suit may and should be dismissed at the threshold, and on this hearing.

We refer at the outset to the one sentence which constitutes an entire affidavit *verified by government counsel* (R. 35):

> "EDWARD S. STIMSON, being first duly sworn, says that the investigation which he has made shows the foreign corporate defendants named herein have endeavored to avoid subjecting themselves to the jurisdiction of the courts of the United States by making their sales abroad only and requiring customers to pay in advance for all purchases."

In other words, the Department of Justice has made an investigation and has ascertained that the corporate defendants are doing business solely in parts of the world outside the United States and have expressly determined to confine their business to their own countries and there-

fore not to subject themselves to the jurisdiction of the Courts of the United States. There are here two propositions:

(1) That the defendant foreign corporations make their sales abroad, i.e. not in the United States.

(2) That that is because they wish to avoid subjecting themselves to the jurisdiction of what to them are foreign (*vide* American) courts.

We admit the first and submit that the second cannot then present a justiciable case or controversy. There remains no issue to be litigated.

Under the simplest principles of the Law of Nations, the Courts of the United States should not entertain such a case

The avowed and only, justification which the Department of Justice makes for the action is that the sales of all the products of their African mines by the mining defendants to or through the defendant Diamond Trading Company in London and the practice of the latter corporation in confining its sales entirely to London deprives the ultimate American consumers of competition of the diamond miners among each other in sales which they might otherwise make in the United States. Seizure (by the present order) of the De Beers bank account is sought to be justified as a pressure to compel action which the Courts of the United States would otherwise have no jurisdiction to compel.

The consequences of this new experiment in litigation may be imagined when one refers to such sentences as the following, which are taken from the brief submitted to and filed with the District Court by government counsel,[4] and

[4]The brief appears in Supplement, Appendix B.

which constitute a direct concession that the so-called "injunction" does not relate to the defendants' business, but is designed as an instrument for some ulterior purpose:

> "The temporary injunction here applied for would in no way interfere with the present methods by which the defendants do business. It would not require any alteration in any of their methods of marketing diamonds. They could continue as they have in the past to sell diamonds abroad and compel purchasers to pay for them in advance.
>
> * * * * * *
>
> "These defendants owe no allegiance to our laws. They have formed a monopoly which gives them fabulous profits. To assume that they will not withdraw completely from this country and that they will voluntarily obey a decree of this Court which would destroy such monopoly, one must be extremely credulous. Any such assumption would be contrary to the facts of life. The Government must be, therefore, in a position to sequester the funds of these defendants to enforce any final judgment that may be entered in this case so as to secure its effective enforcement." (p. 26)

The reasoning is that the bank deposits must be seized because if the Court issues a decree, the defendants will not be found in the jurisdiction at all.

If the judicial power of sequestration (assuming it to exist in the Federal courts) is to be used as the chosen instrument to force British and South Africans to conform to our economic standards, where is it to end? Obviously, the British and South Africans can then reciprocally seize the bank accounts of our citizens in their countries because they may think it economically wrong of us to engage in the free competitive system. The Union of Soviet Socialist

Republics may seize the bank accounts of our citizens in their country because our competitive system is patently antipathetic to their conception of a stabilized economy.

The present case not merely compels consideration of these fundamental concepts. It provides on its owns facts an extreme illustration. The Department of Justice has, both in the complaint (R. 19) and in the brief below, attacked the petitioners for establishing a stockpile of diamonds in Canada instead of in the United States. It did not disclose to the Court below that there was in existence an Executive Agreement under which that stockpile was established. The petitioners thereupon placed it in the record (R. 137). It is an Agreement formally entered into between the Government of the United States, represented by its Minister in London, and the Governments of the United Kingdom and of the Dominion of Canada. (See signatures at R. 144). *Cf. Cook* v. *United States*, 288 U. S. 102.

That an ulterior purpose of the suit was to compel removal of the British diamond stockpile into the United States, thus getting around the solemn engagement made by our government, was expressly stated in the government's brief below:

> "* * * defendants have in Canada a large stockpile of industrial diamonds which has been established to meet the war needs of American industry. The defendants could as readily hold this stockpile in this country. That is where it is to be used. To move that stockpile here would not inconvenience the defendants in the slightest. As a matter of fact, they could so easily thus provide security, any unwillingness on their part to transfer the stockpile, or a portion of it, from Canada to the United States would

warrant an inference that they do not intend to comply with any judgment of this Court.

* * * * *

"* * * Defendants can readily afford this assurance either by giving bond to render themselves amenable to the process of this Court or by moving within this jurisdiction and maintaining here the stockpile of industrial diamonds which they now maintain in Canada for supply to American war industry."[5]

This is asking the Court to bring pressure to bear upon Great Britain and Canada so as to get a better deal for the American public than was obtained by the agreement which its duly accredited representatives in the State Department have negotiated and signed. If this nation is to indulge in the practice of negotiating treaties with Allies, and then try by pressure to get around them and force the Allies to accept terms which in the negotiation they did not accept, we submit that the Courts are not the proper place to commence the practice.

II

SPECIFICALLY AS TO THE ORDER APPEALED FROM.

The sole effect of the order, so far as these petitioners are concerned, was to sequester property. Rule 64 F. R. C. P. applies. The order is invalid, and is supported neither by Federal equity practice nor by New York State practice.

The order, although in substance a sequestration, is in form an injunction. If it be treated as an injunction, it

[5]Supplement, Appendix A, pp. 27, 37.

is governed by Rule 65 F. R. C. P. There is no authority under that rule for a provisional attachment or sequestration of a defendant's property as an incident to a suit to restrain unlawful conduct.

Under no theory is the Court empowered to restrain the use by the defendants of their own money.

Under the circumstances shown here, the order, even if within the power of the Court, was an abuse of its discretion.

The order of course falls if the suit itself be unfounded, —either if the complaint fails to state a claim or if the Court lacked jurisdiction over the persons of the defendants. Both of these factors are present in this case.

The complaint contains no statements of fact to the effect that any of these petitioners entered into any contract, combination or conspiracy in the United States, or did any acts in the United States in furtherance of such a contract, combination or conspiracy. All of the material acts are stated upon the face of the complaint to have happened abroad. The rule in *American Banana Company* v. *United Fruit Company*, 213 U. S. 347 applies.

It is apparent upon the record that there is no substantial ground upon which to base a claim of jurisdiction over the persons of the petitioners. The government's case to the contrary is based upon unsupported statements in the affidavit by an attorney, and in any event such statements do not show facts from which an inference may be drawn either that the petitioners are doing business or are found in the United States. The case for the petitioners is presented in numerous affidavits of record and is so overwhelming as not to leave even a scintilla of doubt upon the question. The question was timely raised before the Dis-

trict Court, and further error was committed by the Court's refusal to consider it.

ARGUMENT

POINT I

THE ORDER—AN INJUNCTION IN FORM AND A SEQUESTRATION IN SUBSTANCE—WAS BEYOND THE POWER OF THE COURT AND UNDER THE CIRCUMSTANCES HERE WAS ALSO AN ABUSE OF DISCRETION.

Certain of the points presented by the government to the trial court in support of the order have been abandoned here.[6] In its brief in opposition to the petitions for writs of certiorari (referred to herein as "its br.", at pp. 11-13), the United States disclaimed intention to support the order upon any of the following grounds:

(1) That the order is supportable under Rule 64 of the Rules of Civil Procedure either as an attachment or seizure,

(2) That the order is valid as a sequestration, or

(3) That the order may be supported as a means of compelling defendants to appear.

The affirmative ground now exclusively given by the government in support of the order is that it is a valid

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[6] Thus, (i) the motion for preliminary injunction claimed that "sequestration * * * is the only means of enforcing this Court's orders" (R. 29), and (ii) one of the point headings in the government's brief below was that "The application for this injunction asks the court to exercise the equivalent of its intrinsic power as a court of equity to issue the writ of *ne exeat*, and exercise of this power against a foreign corporation is not subject to the limitations upon issuance of a writ against an individual."

preliminary injunction under Rule 65 of the Rules of Civil Procedure and "is proper for the purpose of preserving the effective jurisdiction of the District Court" (its br. 9).

Both the preliminary conditions which are contested by us are assumed by the government:

(1) That the complaint states a cause of action, and

(2) That the court below has obtained personal jurisdiction of the petitioners.

Absence of either of these conditions would be fatal to the order. *Deckert* v. *Independence Corporation*, 311 U. S. 282, 287, and cases cited.

We put in issue before the District Court both these assumptions, and supported our position by affidavit, brief and argument. The learned District Judge committed error in supposing that he was entitled to ignore them (R. 169).

Accordingly, in Points II and III, *infra*, we argue that the complaint fails to state a cause of action and that the District Court did not obtain personal jurisdiction of the defendants. In this Point I we argue that the injunction order is bad, accepting *arguendo* the government's assumption that the complaint states a cause of action and that there is personal jurisdiction.

Upon the validity of the order as such, our arguments are two-fold, first, that it is not in fact an injunction at all, but is in fact a sequestration (as the government's motion sought that it should be), and second, that even if it be an injunction, it is not one recognized by law.

(1) The order below was not in fact an injunction but was a sequestration, at least so far as these petitioners are concerned.

The only practical effect of the order on any of these petitioners was to sequestrate $59,320 on deposit by De Beers in a New York bank.[7]

The order is in form that the defendants

> "be enjoined from withdrawing money belonging to the corporate defendants from banks in the United States and from withdrawing diamonds or other property belonging to the corporate defendants from safe deposit boxes in the United States and from withdrawing from the United States or selling, transferring, or otherwise disposing of property belonging to the corporate defendants in the United States until this case has been finally determined and said foreign corporate defendants have complied with all orders and decrees which may be or have been rendered against them in this cause",

with the usual provisions binding their officers, agents, etc. and other persons having notice of the order (R. 172-3).

Thus the order relates to existing funds and does not seek to prevent or restrain any future activity of any sort. Indeed, this was expressly disclaimed by the second paragraph of the order, which expressly disclaimed application to enumerated transactions which would represent conduct of business after the date of the original restraining order

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[7] No assets of either of the other two petitioners were found within the United States and no assets of De Beers other than the deposit in question, which had in fact been made upon the day that the preliminary restraining order issued (R. 125). Apparently before that day none of the petitioners had any assets in the United States of any sort.

(January 29, 1945), such as transmission of further funds from abroad, purchase of diamonds or of mining machinery, etc. (R. 173).

This is a case, therefore, in which what was entitled "Preliminary Injunction" was in effect an attachment, seizure, or "sequestration" of assets. As such it falls properly within the scope of Rule 64 rather than Rule 65. And in substance that seems to be the ground upon which the government supports it. The final paragraph of its argument here in support of the order (its br. 14) opened thus:

> "The need for the injunction was imperative to enable the court to give effect to any final decree entered against the petitioners. Only through sequestration of their funds located here, for non-compliance with a final decree against them on the merits, as authorized by Rule 70 of the Rules of Civil Procedure, will the District Court have power to afford the government relief and to make the court's final judgment effective."

Such language is appropriate to Rule 64:

> "At the commencement of and during the course of an action, all remedies providing for seizure of persons or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner", etc.

Although the government purports to disclaim in this Court invocation of Rule 64 (its br. 9, 12), we will under sub-heading (3) of this Point give the reasons why Rule 64 is indeed inapplicable.

(2) Assuming that the order be treated as an injunction under Rule 65, it is without support in law.

The governing principle is that a preliminary injunction must be within the permissible scope of the final injunction sought in the action. We agree with the government that its purpose is of course to maintain the *status quo*. But there is no general inherent power in Courts to maintain the *status quo* pending litigation, except as that maintenance is accomplished by a temporary order of the same character that may ultimately be granted upon a permanent basis as a result of the litigation. The cases relied upon by the government are all of that class. *Looney* v. *Eastern Texas Railroad Company*, 247 U. S. 214. *Kline* v. *Burke Construction Company*, 260 U. S. 226. *Ohio Oil Co.* v. *Conway*, 279 U. S. 813. *Virginia Railway* v. *Federation*, 300 U. S. 515. *Gibbs* v. *Buck*, 307 U. S. 66. *Deckert* v. *Independence Corporation*, 311 U. S. 282.

In *Looney* an injunction was sought against the institution of suits by a State Attorney General pending a determination by the Interstate Commerce Commission, and the preliminary injunction issued against the prosecution of a suit of that character.

In *Kline* the injunction was denied, but had it been granted, it would have been of the same character as the ultimate relief sought in the action (viz. to enjoin further prosecution of a proceeding in a state court of concurrent jurisdiction).

Ohio Oil was a suit to prevent the enforcement of a Louisiana tax alleged to be unconstitutional, and the pre-

liminary injunction prevented collection of the same tax pending the proceedings.[8]

In *Virginian Railway*, the Federation sought a mandatory injunction that the Railway should treat with the Federation pursuant to the terms of the Railway Labor Act, and the decree restrained interference with the Federation as the accredited representative of the employees.

In *Gibbs* v. *Buck*, the bill attacked the constitutionality of the Florida anti-trust law, and the preliminary injunction was against its enforcement pending the hearing.

In *Deckert* v. *Independence Corporation* the bill was by purchasers to enforce their rights under the Securities Act of 1933 for rescission and restitution by an insolvent vendor. The complaint joined a third party holding assets belonging to the vendor and sought an injunction against disposition of such assets. The preliminary injunction was of the same quality, viz. to prevent such disposition pending determination of the cause.

None of these cases supports the new theory of the Department of Justice that, in an action seeking prevention and restraint of violations of the anti-trust laws, the Court may "enjoin" the defendants from all use of their property even in the absence of a showing or claim that the assets were to be used in furtherance or in aid of the putative conspiracy.

The Sherman Act does contain (in § 6) provision for the remedy of seizure and condemnation of property imported into the United States contrary to law. A similar

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[8] The preliminary injunction was based upon the consideration that the State law had no provision for the return of a tax illegally exacted and was guarded by this Court with provisions for punctual payment of the pre-existing tax, against application for the new tax, and for prosecution of the suit with reasonable expectation to a final decree. 279 U. S. at p. 815.

provision is found in § 76 of the Wilson Tariff Act. But the order is not sought to be supported under these sections. If it were, it would be equally unavailable, as there is no claim by the government that the bank deposit is the subject-matter of the conspiracy.

The government frankly stands upon the naked ground that the District Court may, by way of injunction, seize innocent assets so as to have a sort of francpledge against the possibility that, in the event that it eventually enters a decree and that thereafter the defendants disobey it and that neither of the defendants nor any of their assets are then within the jurisdiction, it may recoup its fine for contempt by forfeiting the property. The government has been able to find no authority to support this proposition, and we respectfully submit that it is wholly untenable.

(3) No provisional attachment or sequestration of a defendant's property is appropriate as an incident to a suit to restrain unlawful conduct.

The government's affidavit in support of the restraining order and the preliminary injunction stated that it was necessary to sequester the defendants' property (including bank accounts) for fear that the Court would not have the means of enforcing obedience to its ultimate judgment in the case.

No such remedy is available in equity cases in our Federal Courts.

(A) *This is particularly true of anti-trust cases.*

Under the anti-trust laws the government is confined to the remedies which those statutes provide. *Paine Lumber Co.* v. *Neal*, 244 U. S. 459. *Geddes* v. *Anaconda Copper*

Mining Co., 254 U. S. 590. *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 174. *Hartford-Empire Co.* v. *United States*, 65 Sup. Ct. 373, 385, 387-8.

The present injunction order does not seek "to prevent and restrain" violations of the anti-trust laws. *Cf. Standard Oil Company of New Jersey et al.* v. *United States*, 221 U. S. 1, 77-78. *United States* v. *American Can Company, et al.*, 234 Fed. 1019, appeal dismissed, 256 U. S. 706. Its sole purpose is to exercise compulsion upon the defendants, so that they will take the affirmative action, which the Department of Justice desires, of doing business in the United States.

(B) *And it is a settled rule of Federal procedure generally.*

Rule 64 of the Federal Rules of Civil Procedure provides that seizures of person or property "for the purpose of securing satisfaction of the judgment ultimately to be entered * * * are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought."

(a) The rule did not seek to change the established rule of Federal procedure that remedies by seizure of person or property are appropriate only when jurisdiction over the person of the defendant has already been obtained. *Big Vein Coal Co.* v. *Read*, 229 U. S. 31. *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 309-313. *Laborde* v. *Ubarri*, 214 U. S. 173, 174. *Ex Parte Railway Co.*, 103 U. S. 794.

It is established in New York that attachment cannot be had at all in equity cases, but only (and of course under

limited circumstances) in cases where money recovery is sought at common law. C. P. A. § 902. 7 Carmody, New York Practice § 309. *Therington* v. *Merrick*, 101 N. Y. 5. *Brown* v. *The Chaminade*, 176 Misc. 238, aff'd 261 App. Div. 1071. *Avery* v. *Avery*, 119 App. Div. 698. The Federal Courts followed the New York rule, apart from the adoption of the Federal Rules of Civil Procedure. *Lazenby* v. *Codman*, 28 F. Supp. 949 (S. D. N. Y., 1939). *Shiel* v. *Patrick*, 59 Fed. 992 (C. C. A. 2d).

The New York rule that seizure of property by attachment is improper in a suit for injunction must be taken to mean that in such a case attachment may not be justified on the ground that it is issued for the purpose of securing satisfaction of possible fines for contempt of the injunction.

(b) Similarly, in a suit in equity where, as here, no final disposition of property is sought, a court may not appoint a receiver *pendente lite* to take charge of the property of the defendant. *Gordon* v. *Washington*, 295 U. S. 30, 37:

> "But there is no occasion for a court of equity to appoint a receiver of property of which it is asked to make no further disposition. The English chancery court from the beginning declined to exercise its jurisdiction for that purpose. *Anonymous*, 1 Atkyns 489, 578; *Ex parte Whitfield*, 2 Atkyns 315; *Goodman* v. *Whitcomb*, 1 Jacob & Walker 589, 592; *Robinson* v. *Hadley*, 11 Beavan 614; *Roberts* v. *Eberhardt*, Kay 69, 148, 160, 161."

(c) The remoteness of the government's claim that it must have funds out of which to collect fines in the event of an eventual contempt makes the common law writ of sequestration improper. Before property may be sequestered the plaintiff's claim must be reduced to judgment or

the plaintiff must have some right of ownership in, privilege to or lien upon the specific property sought to be reached. *Martin* v. *J. B. Berry Sons' Co.*, 83 F. (2d) 857 (C. C. A. 1st); *Applegate* v. *Applegate*, 39 F. Supp. 887 (E. D. Va.); *Ross* v. *Grafton Power Co.*, 60 F. (2d) 663 (D. Vt.). The First Circuit Court of Appeals held in the *Martin* case, in a tort action, that an injunction *pendente lite* restraining defendant from conveying certain negotiable promissory notes, was improper and would not issue until the creditor obtained a judgment against the defendant.

(d) This is not a case in which the injunction *pendente lite* is sought to protect specific property the subject-matter of the action. (1) Such equitable relief will protect only the *res* which is the subject-matter of the action, and (2) will be granted only when that *res* is within the jurisdiction of the Court.

In *Iron City Savings Bank* v. *Isaacsen*, 158 Va. 609, 164 S. E. 520 (cited by the Department below), the Court, in holding the preliminary injunction improper, said:

> "* * * Where process has been served in person on all indispensable parties, or the court has acquired jurisdiction of the *res* and all indispensable parties have been brought before the court by personal service or order of publication, the jurisdiction to grant a temporary injunction is actual chancery jurisdiction * * *." (p. 528)

Similarly, in *Ward* v. *Arrendono*, 1 Hopk. (N. Y.) 213, and *Fisk* v. *Union Pacific R. R. Co.*, Fed. Cas. No. 4,830 (cited by the Department below) real property and property constituting a trust fund, respectively, were involved. In *Cobb* v. *Interstate Mortgage Corp.*, 20 F. (2d) 786

(C. C. A. 4th) (cited by the Department below) transfer of specific corporate assets upon which plaintiff had an equitable lien was enjoined.

Campbell v. *Ernst*, 19 N. Y. Supp. 123, states the rule:

> "* * * before any act can be restrained it must be violative of the rights of the plaintiff respecting the subject of the action * * *."

In the present case the De Beers account with Standard Bank of South Africa (the only property of any of the three petitioners affected by the proposed injunction) is by no stretch of the imagination a subject-matter of this action.

(4) An injunction restraining the defendants from use of their moneys is improper.

An injunction restraining defendants from use of their moneys will not lie even where a plaintiff seeks money damages. *A fortiori*, it is improper where the plaintiff merely seeks a final injunction restraining wrongful acts of a defendant.

Both Federal and New York State law provide for seizure of property only *after* fines have been imposed. Criminal Code, 18 U. S. C. § 569. N. Y. Judiciary Law §§ 753, 773, 792.

The Department has pointed to no authority, either common law or statutory, for tying up property in a suit for an injunction for the purpose of satisfying putative fines which may result from a putative contempt of a putative injunction.

It is fundamental in equity practice that a preliminary injunction is one to hold the situation in *statu quo* and that it must be of the same character as the ultimate injunction sought (1 High on Injunction, § 4). Here (as

suming that there is some cause of action over which the Court has jurisdiction) the ultimate injunction must be one authorized by statute—to prevent and restrain violations of the anti-trust laws. Such an injunction might be one to prevent and restrain the entry into agreements *within the United States*, or the doing of acts *within the United States*, designed to raise the price of diamonds or to otherwise restrain trade therein or to monopolize it. See paragraphs 2 and 3 of the prayers of the complaint. Obviously, the De Beers deposit could not be subjected to perpetual impounding under any such injunction.

"The fact that the suit is brought under the Sherman Act does not change the principles which govern the granting of equitable relief." *Appalachian Coals Inc.* v. *United States*, 288 U. S. 344, 377.

The similar State Court rule was expressed by the Appellate Division of the 1st Department in *Platt* v. *Elias*, 101 App. Div. 518, where plaintiff, in an action against an individual defendant and various banks to compel an accounting, had obtained in the lower court an injunction *pendente lite* restraining the individual defendant from conveying or disposing of any property, and the defendant banks from paying out any deposits. In reversing the order granting the injunction, the Appellate Division pointed out that upon the final accounting plaintiff would not be entitled to recover any specific property of the defendant. The Court said (p. 523):

> "* * * the plaintiff is no more entitled to an injunction in this action than in any case in which a cause of action is alleged against a defendant and the plaintiff then asks to sequestrate all of the defendant's property so that it may be held to apply to any judgment which he may obtain against the defendant."

Accord: *Maine* v. *Alexander*, 115 App. Div. 112. *Golden* v. *Tauster*, 125 N. Y. Supp. 83; *Wright Co.* v. *Aero Corp.*, 128 N. Y. Supp. 726; and *Broadfoot* v. *Miller*, 174 N. Y. Supp. 497.

POINT II

THERE IS AN INSUPERABLE OBJECTION TO THE MAINTENANCE OF THIS ACTION: THE COMPLAINT DOES NOT STATE A CLAIM COGNIZABLE BY UNITED STATES COURTS.

It is essential to the grant of a preliminary injunction that the complaint, upon which it is sought to be based, itself state facts sufficient to constitute a claim to the relief to which the plaintiff claims to be entitled. This has been repeatedly held. *Denver* v. *New York Trust Co.*, 229 U. S. 123, 136. *Mecanno, Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141. *Deckert* v. *Independence Corp.*, 311 U. S. 282, 287.

(1) This suit violates principles of the Law of Nations which have been recognized by this Court.

It has been expressly held that the Sherman Act is subject to the principles of the Law of Nations as to territoriality. *American Banana Co.* v. *United Fruit Company*, 213 U. S. 347, *supra*. This accords with the almost universal rule in civilized States.[9]

[9]It is well known in international law that Mexico is the one country that has stood out for the other rule; but in the famous case of A. K. Cutting, a United States citizen who was arrested in Mexico for an alleged libel published in Texas against a Mexican subject, the United States intervened diplomatically and demanded Cutting's release. See *Moore, Digest of International Law* (1906) Vol. II, § 201. An extended consideration of the applicable principles and review of the laws of the other States follows in § 202.

The general principle was stated for this Court in the carefully considered case of *United States v. Curtiss-Wright Corporation*, 299 U. S. 304, 319[10]:

> "Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356); and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family."

Oppenheim, International Law, 2d ed. (1912) Vol I, p. 204 says:

> "No right for a State to extend its jurisdiction over acts of foreigners committed in foreign countries can be said to have grown up according to the Law of Nations * * *."

A footnote gives emphasis to the point by quoting the exception proposed by the Institute of International Law at its meeting at Munich in 1883:

> "Every State has a right to punish acts committed by foreigners outside its territory and violating its penal laws when those acts contain an attack upon its social existence or endanger its security and when they are not provided against by the Criminal Law of the territory where they take place."

[10]Only Mr. Justice McReynolds dissenting; Mr. Justice Stone not participating.

The anti-trust laws, although important to our economic conceptions, can hardly be said to be of such a type that violation of them abroad can be an attack upon our social existence or endanger our security.

We are not arguing that this principle of the Law of Nations precludes the adoption of a contrary rule by the Congress of the United States. We are not arguing that the Constitution prohibits the Congress from adopting rules repugnant to the Law of Nations if it chooses to do so. But it has been said in this Court that International Law is a part of our law and as such is a law of all States of the Union; *The Paquete Habana*, 175 U. S. 677, 700, repeated in *Skiriotes* v. *Florida*, 313 U. S. 69, 72-3. And it must at least be true to this extent, that the Congress will not be presumed to have intended a statute to violate the Law of Nations unless it clearly says so.

There is thus a union between two approaches to the problem. First, in the absence of Congressional enactment, this Court will apply the Law of Nations as part of the law of the land. Second, Congressional action would be presumed to be in accordance with the Law of Nations, unless the contrary is made plain.

This Court has found occasion to exercise the exception recognized by the Law of Nations in respect of criminal and tortious acts, or other defiances of its own law, *by its own citizens* abroad. Illustrations of this are to be found in *New York Central* v. *Chisholm*, 268 U. S. 29, recognizing a remedy in tort against a New York Railroad Company operating in Canada, *United States* v. *Bowman*, 260 U. S. 94, where a United States citizen made a false and fraudulent claim in a foreign country against a United States Government Agency, and *Blackmer* v. *United States*, 284 U. S.

421, where a United States citizen in Paris ignored a subpoena to testify in a case of public importance in the District of Columbia.

Another type of special case, really illustrative of the rule and not an exception to it, is where the foreign action was intended to be and was in fact operative in the United States. Illustrations are to be found in *United States* v. *Nord Deutscher Lloyd*, 223 U. S. 512, in which a steamship line was withholding funds abroad by way of obtaining payment for transportation from a United States port whence the statutes of the United States required it to provide such transportation free of charge, and *United States* v. *Twenty-five Packages of Panama Hats*, 231 U. S. 358, a fraud upon the United States Customs. A border line case was *Sandberg* v. *McDonald*, 248 U. S. 185, in which by a divided Court it was held that wages need not to be again paid upon arrival in the United States, although the United States law would have forbidden the payment in advance that had in fact been made at Liverpool. The *Sandberg* case was, however, reaffirmed by a unanimous Court in *Jackson* v. *S. S. Archimedes*, 275 U. S. 463.

In every one of these cases without exception the *Banana* case was cited as having stated the general rule. The following is the most frequently selected quotation from the *Banana* case, 213 U. S. 347 at 356, 357:

> "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. * * * For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only

> would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. * * * The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power 'All legislation is *prima facie* territorial.' "[11]

The quotation is closely applicable to our case. In our case the Court below has 'happened to lay hold of' a bank account of the petitioner and is proceeding on that basis 'to treat him according to its own notions rather than those of the place where he did the acts.' Ours is a strong case, because the notions of the place where he did the acts have been translated into the statute law of that place. It is an especially strong case because the other sovereigns with whose authority the order constitutes an interference (the United Kingdom and the Union of South Africa) are sovereigns now allied with the United States in a great war and have evidenced their good faith by arranging for a stockpile in neighboring Canada of the article of commerce in question specially available to the war industry of the United States.

There is no doubt but that the allied nations in question would follow the rule for which we contend. The leading case applicable throughout the British Empire is the decision of the Judicial Committee of the Privy Council in *Sirdar Gurdyal Singh* v. *The Rajah of Faridkote* [1894] A. C. 670. The case was regarded as an unusually impor-

[11] Thus quoted in *New York Central* v. *Chisholm*, *supra*, 268 U. S. 29 at 31-2.

tant one, and seven members of the Judicial Committee sat (five being the ordinary quorum). The principle underlying the opinion of Lord Chancellor the Earl of Selborne is succinctly stated in the headnote:

> "No territorial legislation can give jurisdiction which any foreign Courts ought to recognise against absent foreigners who owe no allegiance or obedience to the Power which so legislates.
>
> "In all personal actions the Courts of the country in which the defendant resides, not the Courts of the country where the cause of action arose, should be resorted to."

The application of the principle was in a case in which the public was interested. The headnote continues:

> "Where a Faridkote Court passed ex parte money decrees against the defendant, who had been treasurer of Faridkote, but at the date of suit had ceased to be such, and was resident in Jhind, of which State he was a domiciled subject:—
>
> "*Held*, that such decrees were a nullity by international law."

Lord Selborne pointed out "that all jurisdiction is properly territorial", a principle which lies "at the root of all international, and of most domestic, jurisprudence on this matter." He distinguished legislation "as between different provinces under one sovereignty (e.g., under the Roman Empire)" where "the legislation of the sovereign may distribute and regulate jurisdiction." He then referred to the American authorities—Story on Conflict of Laws, and Chancellor Kent's Commentaries.

We assume that this Court will be reluctant to respond with a doctrine under which the principles of the anti-trust laws are to be imposed upon all British subjects in respect of the conduct of their business in the British Empire, merely because they open in this country bank accounts which have no connection with any doing of business here.

(2) No part of the subject-matter of this case is factually alleged to have occurred within the territory of the United States, at least so far as these petitioners are concerned.

The substance of the complaint is that the defendants refuse to sell diamonds within the United States (particularly that they do not maintain a stockpile here instead of in Canada), and that their operations abroad are monopolistic under American legal concepts. Except for the conclusory allegation of paragraph 2 (unsupported by any factual allegation, and untrue in fact as to petitioners) that all the defendants do business in the United States; there is not a single act or agreement alleged in the first 56 paragraphs of the complaint which was not, as shown by the complaint itself, performed, entered into and completed wholly outside the United States.

Allegations such as that of paragraph 53 that a defendant "sometimes sells direct to purchasers in the United States * * * on order by direct mail or cable or through brokers" are followed (as in paragraph 54) by an allegation that such purchases are paid for in advance before delivery in London, thus demonstrating as a matter of law that the business transactions sought to be alleged with a contrary innuendo have occurred wholly outside the United States (R. 18-19).

Paragraph 57 alleges the existence of bank deposits in the United States, the obtaining by the defendants of re-

ports as to market conditions in the United States, and a single sale to the United States government in the United States. Paragraph 57 e, R. 19-21. These facts obviously have no relation to the alleged conspiracy, none of them has the slightest semblance of illegality, and none of them is complained of.

The only other transactions alleged in the United States as having any connection with the alleged conspiracy are the advertising (by De Beers only—not by either of the other two petitioners) of cut gem diamonds as desirable gifts for sentimental occasions. The obvious purpose of the advertising is to stimulate a demand for the ultimate diamond product in this country and thus indirectly to stimulate purchases by dealers or cutters of the raw uncut diamonds sold in London. Par. 57 a and b, R. 20. It is significant that the prayer for relief does not mention the advertising, nor is it mentioned in the present order.

Allegations that defendants have property in the United States, that they obtain economic reports from wholly independent sources within the United States, or that they advertise the ultimate product within the United States, can neither support the cause of action which the complaint purports to state nor conceal the fact that the alleged cause of action deals solely with extra-territorial acts of the defendants.

The government will doubtless refer to the allegation in its complaint that the principal market of diamonds is in the United States (par. 29, R. 9) and to the general conclusory allegation that the conspiracy in Africa and England was intended to operate in restraint of the foreign commerce of the United States (par. 30, R. 9-10).

As to the first, the answer is that the principle of territoriality recognizes no exception for cases in which the country of the forum is merely an ultimate market for goods affected by transactions abroad. It is under the laws of South Africa and Great Britain that all stages of dealing with raw uncut diamonds take place, from the production at the mine in South Africa to the sale in London. It may well be that these raw materials become (after cutting or other fabricating) industrial and gem diamonds, and that a majority of these in turn find their way into the foreign commerce of the United States. But if that be a justification for the United States Courts reaching back in their jurisdiction over all of the earlier stages of production, the same must be true of all the products of the world for which the United States is a principal market. Where is it to end?

And if that is to be the principle applicable under our laws, why is it not equally applicable under the laws of other nations? Lancashire, for example, may consider itself a principal market for Southern cotton; and the English Courts, hearing of the new doctrine now advanced by the United States Department of Justice, might then take the view that the proper forum in which to settle the economic principles to govern the production and sale of Southern cotton would be the Royal Courts of Justice in The Strand, London.

As to the general conclusory allegations that there was an intent to restrain foreign commerce of the United States, these can not, under familiar rules of pleading, be operative in the absence of supporting allegations of fact. Of course, unless it were alleged that there was either an effect upon, or intent to affect, the foreign commerce of the

United States, the complaint would not even have the semblance of propriety. But more is needed than a mere conclusion. The complaint goes on to describe in considerable detail the history and nature of the diamond business in Africa and Europe, as the Department of Justice investigators have understood it. It is abundantly plain that no claim is made that any essential step in the production or marketing of diamonds is taken by any of the petitioners within the United States, or even that at any step there is a discrimination by the petitioners against purchasers who may intend ultimately to use or resell in the United States in favor of purchasers from other countries.

The complaint is not predicated upon any specific effect upon our commerce, but is rather directed against the entire method of conducting the business in Africa and England.

(3) It is settled that the anti-trust laws do not have extra-territorial effect.

The leading case is of course *American Banana Company* v. *United Fruit Company*, 213 U. S. 347, in which it was held that the United States had no jurisdiction over even the most violent acts done abroad to suppress competing banana producers and even though an indirect result was to monopolize trade in a commodity principally destined for sale in the United States.

Mr. Justice Holmes said, for a unanimous Court (at pp. 355, 357):

> "It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other

states. It is surprising to hear it argued that they were governed by the act of Congress.

"* * * 'All legislation is prima facie territorial.' *Ex parte Blain, In re Sawers,* 12 Ch. Div. 522, 528; *State* v. *Carter,* 27 N. J. (3 Dutcher) 499; *People* v. *Merrill,* 2 Parker, Crim. Rep. 590, 596. Words having universal scope, such as 'Every contract in restraint of trade,' 'Every person who shall monopolize,' etc., will be taken as a matter of course to mean only every one subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned."

The *Banana* case is to be contrasted with *United States* v. *Sisal Sales Corporation,* 274 U. S. 268, in which it was shown that the whole plan to monopolize the article of commerce (sisal produced in Yucatan, Mexico) was worked out in New York by an agreement between bankers and others and carried out by the creation of exclusive selling corporations inside the United States. Mr. Justice McReynolds said (p. 276):

"Here we have a contract, combination, and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein."

Uniformly and without exception it has been recognized that our anti-trust laws do not reach acts or agreements entirely completed outside the United States and not requiring any act or thing to be done within the United States.

United States v. *383,340 Ounces of Quinine Derivative*, Admiralty No. 98-242 (S. D. N. Y., 1928), involved an alleged foreign cartel monopolization of quinine. However, unlike the present case, the alleged cartel sent the quinine to the United States and sold it here. The government seized the quinine here under the forfeiture provisions of the Wilson Tariff Act. A decree ultimately entered contained the following:

> "(f.) Provided, however, that nothing herein contained shall be construed to restrain or prohibit any defendant from doing any act or entering into any agreement which is entirely completed outside the United States and which does not require any act or thing to be done within the United States."

United States v. *Deutsches Kalisyndikat Gesellschaft*, Equity No. 41-124, S. D. N. Y., 1929, involved an alleged foreign cartel monopolization of potash. Sales were admittedly effected within the United States. The decree recognized that no law of ours could force the French and Germans to compete for American business. It provided:

> "(4) Provided that no provision of this decree shall be construed to prevent defendants from selling and delivering all or any part of their potash salts outside of the United States to a corporation organized under the laws of any country other than the United States regardless of any stock ownership or other interest in said corporation by any or all

> of the parties hereto; or to prevent said corporation from selling and distributing in the United States such potash salts so acquired * * *"

That our anti-trust laws do not apply to wholly extra-territorial acts even by American corporations was recognized by this Court as recently as in the opinion in *Hartford Empire Co. et al.* v. *United States*, decided January 8, 1945, 65 Sup. Ct. 373, 385, with reference to paragraph V (D) of the decree.

The Department of Justice now seeks to disregard this settled law and, by seizure of funds of these South African companies in the United States, to *force* them (1) to conduct their business outside the United States acc ing to American concepts, irrespective of the laws of the countries under which they are organized and are doing business, and (2) to extend their business into the United States.

The government's memorandum below made plain that the primary purpose of the Department of Justice was to force the defendants to remove all or part of a stock-pile of diamonds from its present location in Canada to the United States and to make sales here out of the stockpile so established here (Supplement, Appendix B, pp. 24-27). At p. 24 it complained:

> "* * * They [the defendants] would not allow this Government to establish a stockpile of industrial diamonds in the United States; the most they would do was to establish such a stockpile in Canada, which could be drawn on only under certain conditions."

And on pp. 25-26:

> "Defendants * * * require purchasers to come to London to purchase diamonds and to pay for them

in advance; they insist that the stockpile of diamonds for our war effort be placed in Canada in their possession; * * *"

And on p. 27:

"* * * defendants have in Canada a large stockpile of industrial diamonds which has been established to meet the war needs of American industry. The defendants could as readily hold this stockpile in this country. That is where it is to be used. To move that stockpile here would not inconvenience the defendants in the slightest."

Yet this stockpile was maintained in Canada pursuant to *an agreement among the Governments of the United States, Canada and the United Kingdom of Great Britain and Northern Ireland, entered into March 26, 1943* (*Article 3*). A copy of that Agreement is in the record, R. 137. The conditions under which the Government of the United States is entitled to make withdrawals, which the Department claims to be a part of the defendants' illegal conspiracy and one of the "violations of law." (Complaint, par. 54), are imposed by this Agreement (Article 6). The Agreement recognizes the very relationships between the defendants which the Department attacks, and it provides that sales out of the stockpile shall be in accordance with those relationships (Article 9). The action of the defendants of which the Department complains is, by the terms of the Agreement, subject to the control of the British Ministry of Supply, an official war office of the British Government (Appendix V). Article 4 of the Agreement leaves to the British Government (not to the defendants or the Government of the United States) determination as to whether a portion of the stockpile shall be in the United States.

The alleged cause of action, therefore, is the making of arrangements by the defendants for the sale, outside the United States, of raw uncut diamonds produced outside the United States, all of which arrangements are completed outside the United States, and the purpose of the Department is to set aside those arrangements and compel the defendants to conduct operations within the United States, notwithstanding that other branches of the Government of the United States have entered into formal agreements with the British and Canadian Governments recognizing—indeed requiring—the very transactions which the Department attacks.

The Department is thus in substance seeking to seize funds of foreign companies as a weapon to compel them (1) to breach the arrangements provided for by a solemn international agreement to which the United States is a party, (2) to bring other property into the United States, and (3) to conduct business in the United States. Employment to such an end of such injunction as is here sought would not only be a gross breach of international good faith but a gross abuse of the injunctive process.

(4) Under English law the acts here complained of were legal.

Immediately following the adoption of the Sherman Act, modern English law took a course sharply divergent from that which was destined to be taken in the United States. *Mogul Steamship Company* v. *McGregor, Gow & Co.*, [1892] A. C. 25, in which the plaintiff relied upon American decisions.

In *North Western Salt Company, Limited* v. *Electrolytic Alkali Company, Limited* [1914] A. C. 461, the case was an extreme one, as shown by the headnote:

> "The plaintiff company was a combination of salt manufacturers formed for the purpose of regulating supply and keeping up prices, and it had the practical control of the inland salt market. The members of the company were entitled to be appointed as its distributors, i.e., agents to sell on behalf of the company the salt which it had purchased from them. The defendants, who had not joined the combination, agreed to sell to the company for four years 18,000 tons of salt per annum, of which a certain proportion was to be table salt, at a fixed uniform price per ton, and undertook not to make any other salt for sale. * * * The defendants having sold salt in violation of this agreement, the plaintiff company sued them for breach of contract."

Indeed, the case was so extreme that a majority of the Court of Appeal, notwithstanding the authority of the *Mogul Steamship* case, held that the contract was in restraint of trade and illegal. [1913] 3 K. B. 422. The decision was reversed. We quote from the speech of Lord Chancellor Haldane [1914] A. C. at p. 469:

> "Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufactures in a particular trade is an evil from a public point of view."

The rule in conflict with our own has persisted in England. First the Court of Appeal and later the House of

Lords sustained enforcements by trade associations of blacklists on the ground that the effort to exclude competitors was actuated by motives not of spite but of *bona fide* desire to protect the defendants' own trade interests. *Ware and De Freville, Limited, v. Motor Trade Association* [1921] 3 K. B. 40. *Sorrell* v. *Smith and others*, [1925] A. C. 700.

A final effort to find a distinction was made in *Thorne* v. *Motor Trade Association* [1937] 3 All England Reports 157. By the rules of a trade protection association, in pursuance of a policy of price protection, the members were required to sell their goods at fixed prices and not to sell such goods to any person, whether a member or not, who sold such goods at other than the fixed prices. Again, the association circulated a black list. Again, the House of Lords was unanimous in adhering to the established rule.

We respectfully submit to this Court that it is impossible to read the carefully reasoned, unequivocal and unvarying decisions of the long succession of England's leading judges who sat in these cases and then to contrast them with the equally carefully reasoned, unequivocal and unvarying decisions of the members of this Court over the same period of history, all upon the same issue,—interpretation of the words "restraint of trade",—without being profoundly impressed by the difficulties which must arise if the Law of Nations be displaced and there be substituted a conception that the Courts of each nation are to sit in judgment upon the economic practices within another nation.

POINT III

PETITIONERS' AFFIDAVITS ESTABLISH THAT THE DISTRICT COURT HAD NO PERSONAL JURISDICTION OVER THESE PETITIONERS.

Under federal procedure property may not be attached if the Court has no jurisdiction over the persons of the defendants. *Big Vein Coal Co.* v. *Read*, 229 U. S. 31. *Rorick* v. *Devon Syndicate*, 307 U. S. 299, 309-313.

The Court below expressly declined to pass upon this question, notwithstanding that it is the duty of the Federal Court to satisfy itself of its jurisdiction preceding the grant of an injunction. *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275, 279, 280; *Mitchell* v. *Maurer*, 293 U. S. 237, 244. The petitioners' contest of jurisdiction was raised promptly at the first hearing on the motion in February and at every subsequent hearing (R. 57, 59). It was supported by voluminous factual affidavits, all of which the Court ignored. A holding that the activities of petitioners subjected them to the jurisdiction of the Court below would be in plain violation of the principles laid down by this Court in *Green* v. *C. B. & Q. Ry. Co.*, 205 U. S. 530, and *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, 87.

(1) None of these petitioners is or has been doing business or is "found" in the United States. The Government theory that a corporation is found here because it advertises here, is fallacious.

The subject-matter of this litigation is raw uncut diamonds, not diamonds cut into gems such as are purchased retail in the United States. The complaint is that diamond miners in South Africa (e.g. petitioner De Beers) sell their raw uncut diamonds, not into the United States, but to companies in Africa (e.g. petitioner Diamond Corporation) or London (petitioner Diamond Trading). Diamond Corporation also sells its raw uncut diamonds to Diamond Trad-

ing in London, which in turn insists on consummating its own sales exclusively in Africa or London (except that a stockpile is maintained in Canada).

It is not claimed that these petitioners sell, or indeed purchase, or even solicit, in the United States.

The defendants are South African corporations; they have not been licensed to do business in any state in the United States (R. 3-4); they maintain no office or place of business in the United States (Appendix B, p. 26); nor do they have any employees in this country (R. 104-7, 132). They have no merchandise here, and have made no sales here except for a total of five isolated sales since 1938, all but one to the United States Government itself and made pursuant to the government's request (R. 127-130). No corporate meetings are held in this country, and none of their directors or officers resides here (R. 86, 132). Except for temporary bank credits, they own no property in ~~this State~~ New York or in any other state (R. 122-6).

The transactions of the petitioners in the United States were isolated and trivial:

Diamond Trading, which is engaged in the business of selling rough uncut diamonds in London, has had no transactions of any sort in or with the United States except only that, at the express request of the United States Government, for the sake of national defense and the war effort, it has, in the last five years, made a total of five sales to and at the request of United States government agencies—the Procurement Division of the Treasury Department, Metals Reserve Company and United States Commercial Company (R. 129).

Diamond Corporation sent two lots of diamonds to the United States (R. 128)—one for exhibition at the New

York World's Fair in 1939, the other presumably for security against enemy seizure in June 1940, and in 1941 sold to the Procurement Division of the Treasury Department such balance of the two lots as remained in the United States.

De Beers has (1) at various odd times had representatives in the United States for brief periods and for special purposes, for example to arrange an exhibit at the New York World's Fair of 1939 (R. 105); (2) has received reports as to the general conditions of the diamond trade in the United States, in only one case a report from one of its own representatives (R. 100, 115), (3) has made a single sale in the United States, viz. of the diamonds that had been exhibited at the New York World's Fair (R. 127), and (4) has contracted with an American advertising firm to advertise cut gem diamonds in the United States (R. 86 *et seq.*).

The basis for the government's theory that these petitioners are found here rests ultimately upon the proposition that De Beers advertises in American newspapers and magazines and employs an American advertising firm to conduct such advertising.

Had the advertising been the element of which the Department of Justice was really complaining, the remedy sought would have been an injunction against the advertising, which would of course be effective to prevent American publishers from publishing the prohibited advertisements irrespective of the absence of the defendants from this country.

That the Department did not seek such an injunction was established by its waiver, in the restraining order as modified after argument (R. 62 at 64) and in the injunc-

tion order (R. 171 at 173), of the prohibition in the original *ex parte* restraining orders (R. 35, 46-7) against use for any purpose of funds subsequently sent by the defendants to United States banks. On the argument (March 2) "counsel for De Beers Consolidated Mines Ltd. asked that the temporary restraining order be modified to permit the continuance of the advertising and publicity campaign and public relations work being carried on in the United States for De Beers Consolidated Mines, Ltd., and counsel for the United States consented thereto" (R. 62).

Even if advertising were a badge of doing business, the De Beers case would be an extreme one in favor of the defendant. De Beers neither advertises the products which it itself mines and sells nor does it itself prepare, conduct or even supervise the advertising.

Its advertising does not in any way solicit purchasers of a De Beers product. It is purely good-will advertising, to encourage the purchase of the ultimate product gem diamonds, in the hope that there may indirectly and eventually be a larger market for De Beers raw products—the rough uncut diamonds.[12] The distinction is an important one, as the price paid to De Beers for its rough diamonds is normally only a small fraction of the price paid by the customer in America for the ultimate gem diamond that is being cut from the rough diamond (R. 27).

Incidentally, these considerations appear eloquent of the government's entire misconception of the diamond trade in launching upon this case. The government's main complaint is that De Beers has kept diamonds off the market in order to increase prices to American purchasers (R. 22-24). But as shown in the affidavits, the interest of all three

[12] A full set of De Beers advertisements is on file with the Clerk of this Court (R. 177-8).

petitioners has been to sell the maximum number of diamonds. De Beers does not advertise in order to restrict purchases, and De Beers has consistently maintained that prices in America are higher than they ought to be (R. 96-8).

Furthermore the De Beers advertising is done by an independent contractor, not officers or employees of De Beers.

(2) It is well settled that the advertising and publicity work conducted by Ayer & Son, an American advertising firm, on behalf of a foreign client would not be "solicitation of business" within the established meaning of the word.

The cases cited by the government in its memorandum below for the proposition that soliciting business constitutes doing business are not in point because the advertising carried on by Ayer & Son was not "solicitation of business" within the established meaning of the word.

The "solicitation" involved in the case at bar differs from that involved in the cases cited by the government in three fundamental respects. These differences are contrasted in the parallel columns below:

In the cases cited by the government,	In the case at bar,
(1) The sales agents were engaged to solicit the public to purchase merchandise from or to enter into transactions with the defendant.	(1) The public was "solicited", if at all, to purchase from independent jobbers and retailers articles (cut gem diamonds) that did not and never had belonged to any of the defendants (who were miners and sellers only of rough uncut diamonds).

(2) The solicitation consisted of sending agents into the State to personally request and take orders for the defendants' product.	(2) The "solicitation", if such it was at all, consisted merely of advertisements and news items appearing in newspapers and magazines.
(3) The persons conducting the solicitation were employees and agents of the defendant exclusively engaged in promoting sales of the defendant's product.	(3) The firm conducting the "solicitation", if such it was at all, was an independent contractor. Being one of the oldest and largest advertising concerns in this country and having many clients both here and abroad, it devoted only a part of its time in publicizing diamonds. In advertising and publicizing diamonds it was carrying on its own separate business.

It is well established that the activity described above in the second column is not "solicitation of business" within the established meaning of the word.

Each of the three factual distinctions will be discussed in the order listed above.

(1) *The advertising carried on by Ayer was designed to induce the public to purchase from independent jobbers and retailers and did not solicit anyone to make purchases from the defendants.*

It is established beyond dispute that this type of publicity is not "solicitation of business."

The most recent recognition of this principle is contained in *Frene v. Louisville Cement Co.*, 134 F. (2d) 511 (C. C.

D. C., prevailing opinions per Rutledge and Edgerton, *J. J.*, with Stephens *J.* dissenting), generally regarded as the most extreme decision in favor of jurisdiction that has yet been rendered. There Mr. Justice Rutledge distinguished the earlier case of *Whitaker* v. *Macfadden Publications*, 105 F. (2d) 44 (C. C. D. C., 1939, Edgerton, *J.*) by saying:

> "In the Whitaker case there was no 'solicitation' of business by the agent *in the usual sense, but only the stimulation of the sales of an independent jobber.*"

In the *Whitaker* case the defendant, a New York magazine publisher, employed and directly paid an agent, one Pendergast, and four assistants, to promote and to supervise the sales of defendant's magazines among street vendors in Washington, D. C. Defendant sold and shipped its magazines to, and collected payment from, the District News Company of Washington, D. C. The District News Company resold and collected from retailers and street vendors. The defendant was held not to be doing business within the District of Columbia. In so holding the Court distinguished between the activities of an agent who solicits the public to enter into transactions directly with a defendant and those of an agent of a producer who solicits the public to purchase from retailers. The Court illustrated the distinction by contrasting Pendergast's activities with those of the local agents in *Green* v. *C. B. & Q. Ry. Co.*, 205 U. S. 530:

> "* * * The local agents of the Burlington solicited persons *to enter into transactions with their employer*, but the local agents of Macfadden do not; the transactions which Pendergast and his assistants

promote are *sales by the District News Company to newsboys or by newsboys to the public.* The Burlington agents made contracts and received money for their employer, but the Macfadden agents do neither. * * *" [emphasis added.]

Similarly, Mr. Justice Rutledge contrasts Pendergast's "stimulation of sales of an independent jobber" with that of the agent in the case before him, who devoted his entire time to soliciting the public to enter into transactions *with the defendant.*

The distinction is also illustrated in the other cases referred to by Mr. Justice Rutledge in which, on very similar facts, the agent was held not to be doing the business of the defendant: *Krieger* v. *Macfadden Publications,* 38 F. Supp. 472 (D. C. Md., 1941); *Cannon* v. *Time, Inc.,* 115 F. (2d) 423 (C. C. A. 4th, 1940). To the same effect: *S. B. McMaster, Inc.* v. *Chevrolet Motor Co.,* 3 F. (2d) 469 (E. D. S. D., 1925).

There can be no question but that the publicity work of Ayer & Son falls directly within the category of cases which Mr. Justice Rutledge designated as mere "stimulation of sales of an independent jobber." The relationships between an African diamond miner and an American diamond retailer are incomparably more remote than the relations between a New York magazine publisher and a District of Columbia newspaper vendor. After the rough uncut diamond leaves De Beers' hands it passes through many intermediaries, including brokers, importers and other dealers in rough diamonds, fabricators commonly called diamond cutters, wholesalers and retailers. The price paid for the finished diamond by the ultimate buyer is many times the price received by the producer for the

rough diamond. In the *Whitaker* case, *supra*, the magazine, after leaving the hands of the defendant-publisher, passed only through the hands of the District News Company and the ultimate vendor.

The rule that stimulation by a producer of the sales of independent jobbers is not "solicitation" recognizes the fact that (i) soliciting the public to purchase one's wares "although probably essential" is nevertheless "incidental and collateral" to the doing of most businesses, *Green* v. *C. B. & Q. Ry. Co.*, 305 U. S. 530, 532, and the further fact that (ii) inducing the public to trade with ultimate jobbers or retailers is incidental to doing the business of producing the product sold by the retailers.

(2) *The activity carried on by Ayer & Son was merely advertising and was not personal solicitation by agents for orders.*

Where a defendant sends its agents into a state to personally solicit the public to enter into transactions with the defendant (and sufficient additional business activity is carried on), the defendant is said to be doing its business in that state. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579. *Frene* case, *supra*. However, where no agents are sent into the state to take orders for the defendant, it cannot be said that defendant is doing its business therein merely by reason of the publicity given by advertising to defendant's product.

It is clear that when the cases use the term "solicitation", they refer to active personal solicitation through agents, and do not refer to mere advertising.

Thus Mr. Justice Rutledge, in his opinion in the *Frene* case, used the term "solicitation" as synonymous with

"taking of orders" or "selling" (p. 516), and expressly pointed out that the solicitation of orders through an agent must be distinguished from "creation of good-will and furtherance of good relations between the defendant and its customers or the ultimate customers of its product." The lower court was there reversed for the very reason that it assumed that these two activities were indistinguishable. Again, in the *Frene* case the agent's personal solicitation of orders for brixment was described as "energetic selling methods." He personally requested the plaintiff to use brixment in the construction of his house, invited plaintiff's business partner and wife to a theatre and dinner in an effort to promote the use of brixment, and invited plaintiff to luncheons where the use of brixment was discussed. The agent also personally procured orders for defendant's product from building supply dealers. He devoted his entire time to the promotion of defendant's merchandise. Among the agent's duties "was also the prevention of claims and disputes. It was taking a part, though not a final one, in adjusting them. It was aiding with problems of the Company's obligations." (p. 518). The defendant expressly instructed the agent to visit specific jobbers where its product was being used and to assist in straightening out whatever complications had arisen or might arise.

The lower court held that the prevention of claims and disputes was merely the creation of good-will and was part of the process of solicitation, and therefore that no "solicitation plus" was involved in the case. The Court of Appeals reversed, holding that the creation of good-will was not part of the process of solicitation and that, therefore, more than "solicitation" was involved.

The reason for the rule that mere advertising does not constitute doing business was well stated by Judge Brewer in *Carpenter* v. *Westinghouse Air-Brake Co.*, 32 Fed. 434 (C. C. S. D. Iowa, 1887) (p. 436):

> "* * * If we say that the mere matter of advertising a business is the introduction of that business in the state, it would follow that every corporation located elsewhere that should send its circulars into the state, send newspapers with its advertisement, would be engaged in its business in that state, and to be found there for purposes of suit."

If the advertising here in question is held to be the basis for jurisdiction over these foreign corporations, the manufacturer of every nationally advertised product will be subject to suit in every state in the union. Placing an advertisement with a magazine having a nation wide circulation, or buying radio time over a national network, would force the manufacturer of the product advertised to defend actions brought in any one of the several states. It is obvious that this is not what Congress intended when it required that process be served upon a foreign corporation in the district where it may be "found."

Even more circumspect must be the approach to a wholly foreign corporation engaging merely in advertising here.

(3) *Ayer & Son carried on the advertising of diamonds as its own separate business. Ayer is an independent contractor and not an agent of the defendants.*

In order to hold that an agent is carrying on the business of the defendant within the territorial jurisdiction of

a court, it must be found that the activity carried on by the agent is the business of the defendant, and not merely the separate business of the agent.

In the cases cited by the government in its memorandum below not only did the sales agents personally solicit prospective customers to buy the defendant's merchandise directly from defendant, they were also employees and agents of the defendant engaged exclusively in promoting sales of the defendant's merchandise.

However, by way of contrast, in the cases where a sales agent solicits the public to purchase directly from the defendant but the sales agent is engaged in the general business of soliciting orders for a number of companies, it is held that the business conducted by the sales agent is his own and not that of the defendant.

Moreover, where, as here, the activities in question are carried on, not by an employee, but by an independent contractor, it is held that the independent contractor is carrying on his own business and not that of the defendant. *Bank of America* v. *Whitney Bank*, 261 U. S. 171. *Cannon Mfg. Co.* v. *Cudahy Co.*, 267 U. S. 333.

In the case at bar the advertising and publicity work of Ayer & Son was its sole and separate business; it has no business other than the sales promotion of various products, and the advertising here in question was merely a part of its regular business. On the other hand, the business of De Beers is the mining of diamonds in Africa and the selling of the rough uncut products of its mines. The stimulation of purchases of the finished diamond in America is so far incidental to the business of De Beers that such activity, carried on through an independent advertising company, cannot be considered as the business of De Beers.

(3) Even if the advertising be considered the equivalent of "solicitation of business", there was not enough additional activity carried on in New York to subject the defendants to service of process here.

The facts upon which the government relied appear in one of the affidavits of Mr. Stimson, of government counsel, at R. 73 *et seq.* After stating the intercorporate stockholdings of the petitioners, there follows this paragraph:

> "All the officers and employees of De Beers Consolidated Mines, Ltd., Diamond Corporation, Ltd. and Diamond Trading Company, Ltd. reside outside of the United States and to the knowledge of deponent, all the property belonging to the three corporations, with the exceptions hereinafter set forth, is located in countries outside of the United States."

The affidavit then attempts to alleviate these necessary concessions by suggesting that the petitioners "have followed the practice of regularly sending their officers and employees to the United States to transact the business of the three companies." To this there are two answers:

First. Assuming that the evidence offered by Mr. Stimson establishes his thesis that petitioners are "transacting business" in the United States, this is still insufficient, in the absence of a further showing that the petitioners "do business" and are "found" within the United States. The conception of "transacting business" has relevance only to the venue in which a corporation may be sued under the antitrust laws. Clayton Act § 12, 38 Stat. 736, 15 U. S. C. § 22. But process must be "served in the district in which it is an inhabitant or wherever it may be found" (*id.*). These petitioners are inhabitants of South Africa, and the

sole issue therefore is whether they are "found" within the United States.

Where American corporations are concerned, they may be sued in districts where they "transact business", although not "found", and process may then be served where they are found. *Eastman Kodak Company* v. *Southern Photo Materials Company*, 273 U. S. 359. To be found within a district, two tests must be met: A subjective test—that the corporation has subjected itself to the local jurisdiction (which is expressly disclaimed by the government, R. 35); and an objective test—that it is *carrying on* business within the jurisdiction. *Ibid.*, at p. 371. But a corporation may be "*transacting* business" within a jurisdiction, even though it closes no contracts there but merely does such acts as sending its traveling salesmen into the district to solicit orders or is sending demonstrators into the district to explain the nature and quality of its goods, neither of which activities would suffice to support a holding that the corporation is so "*doing* business" as to be found there. *Ibid.*, at pp. 370-1. See also *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171. The conception of being "found" is therefore assimilated to the conception of "*doing* business", as distinct from "*transacting* business". See also *People's Tobacco Company* v. *American Tobacco Company*, 246 U. S. 79, 84, 86.

As to a foreign corporation, the conception of "transacting business" therefore has no materiality, and such a corporation is open to suit in the United States only if it "does business" and is "found" here. The government has not made a serious attempt even to establish either of these ultimate facts. See the double use of the phrase "transact

business" in the relevant portion of the Stimson affidavit (R. 74).

Second. The evidence relied upon by the Stimson affidavit as establishing that the petitioners "transact" business in the United States is as follows:

(a) That one officer of De Beers was in the United States for most of 1941 and 1942, and another for six months in 1943-1944, during which period office space was furnished to them by the advertising firm of N. W. Ayer & Son, Inc. or the independent mining firm of Newmont Mining Co. (Stimson, R. 74; compare Shelly,[13] R. 104-107 and Secretary of Newmont Mining, R. 126).

(b) That the purpose of the visits was to direct the advertising, report to the home office on market conditions generally in the United States, investigate complaints, hold conferences in order to promote goodwill, and the like (Stimson, R. 74-75; compare Shelly, *id.*).

(c) That the petitioners' officers "carried on negotiations with the officers of the United States Government in respect of selling large amounts of diamonds" (Stimson, R. 75; compare Simpson, R. 127-130).[14]

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[13] Shelly, a Vice-President of N. W. Ayer & Son, Inc. supplied a detailed affidavit relating to all of these points (R. 85-107).

[14] L. S. Simpson furnished an affidavit of fact based on cables from South Africa and describing the isolated sales in the United States. *Simpson*, associated with the petitioners' attorneys, is not to be confused with *Stimson*, who made the affidavits on behalf of the government.

But it later appears precisely what these negotiations were,—that they were at the request of the government in connection with the war effort and for the purpose of a certain limited number of specific sales.

(d) That petitioners displayed diamonds at the New York World's Fair in the years 1939 to 1941 (Stimson, R. 75; compare Shelly, R. 105).

(e) That De Beers contributed sums of money to associations such as the Gemological Institute of America, the American Gem Society and Jewelry Industry Publicity Board (Stimson, R. 75).

(f) That N. W. Ayer & Son, Inc. did little special services such as investigating retail prices, reporting on government price regulations, on complaints about diamonds, and on hour and wage conditions of diamond cutters in the United States, "and receives and forwards mail for" petitioners. All of these are explained in the Shelly affidavit (Stimson, R. 76; compare Shelly 99-104).

(g) That De Beers owns an interest in a bank entitled Banque Diamantaire Anversoise (Stimson, R. 78). A detailed affidavit from the managing director of the Banque discloses that De Beers and Diamond Corporation, Limited, together own less than 10% of its stock (R. 108-114).

We appreciate that it is not the function of this Court to pass upon facts, particularly if and when they have been passed upon below. But these facts were *not* passed on below, because the learned District Judge thought (we submit erroneously) that personal jurisdiction of the

defendants was unnecessary. And we further submit that the sum total of all these facts falls so far short of what is necessary to hold that a foreign corporation is doing business and is found within the United States, that it must be held as a matter of law on this ground, if on no other, that the Court below lacked power to issue the order appealed from and abused its discretion in doing so.

In *People's Tobacco Company* v. *American Tobacco Company*, 246 U. S. 79, it was held that the defendant was not amendable to process in the foreign State although it issued circulars, advertised its product, sold its merchandise directly to jobbers in the State, sent its agents or drummers into the State to solicit orders of the retail trade to be turned over to the local jobbers, and owned stock in local subsidiary companies which owned stock in companies carrying on the tobacco business in Louisiana.

By way of contrast, De Beers does not sell its merchandise in the United States; it does not send agents into this country to personally solicit orders; it does not own stock in companies doing business in the United States; and it has given power of attorney to no one in this country to perform acts of any kind on its behalf.

That the absence of these factors is conclusive, is shown by the manner in which the Court distinguished *International Harvester Co.* v. *Kentucky*, 234 U. S. 579:

> "The plaintiff in error relies upon *International Harvester Co.* v. *Kentucky*, 234 U. S. 579, but in that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the State, but there was also authority upon the part of such agents to receive payment

in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; these things, taken together, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that State."

The decision in the *Tobacco* case was made subsequent to and in light of a long line of decisions to the same effect. *Peterson* v. *C. R. I. & P. Ry. Co.*, 205 U. S. 364. *Green* v. *C. B. & Q. Ry. Co.*, 205 U S. 530. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579. *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264.

In *International Harvester* v. *Kentucky*, for example, the foreign corporation not only regularly and continuously sent agents into Kentucky to solicit orders personally, but the agents had authority to bind the company contractually and to conclude sales. The selling agents were also authorized to receive payment in checks, drafts or notes of customers. Defendant's machines were regularly delivered into the State pursuant to the orders taken and accepted by the defendant's agents.

And in *St. Louis S. W. Ry.* v. *Alexander*, 227 U. S. 218, the foreign corporation rented and maintained in New York an office which had defendant's name on the door. A director of the defendant corporation resided in New York and attended to and adjusted claims against the Company. Plaintiff's claim was taken up and handled from the New York office.

The contrast between such cases and our own is manifest.

CONCLUSION

On three separate and independent grounds the order below was wrong. As a matter of procedure, it was unwarranted. It was based upon a complaint which failed to state a claim. And there was no jurisdiction over the persons of the petitioners. Any one of these three grounds should suffice to sustain a reversal of the order. To them may be added the special considerations of public policy involved in the institution of this suit at this time against corporations which are acting in accordance with the statutory policy of Allied nations to which they are subject and in accordance with executive agreements entered into with the government of the United States.

It is respectfully submitted (1) that the case should be remanded to the District Court with a direction to dismiss the complaint, or in the alternative (2) that the order appealed from should be reversed.

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